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No. 58

In the
Supreme Court of the United States

OCTOBER TERM, 1993

JAN C. HARMS, ROBERT E. HEINZ, SUE C. MAGEE, TIMOTHY H. RUSH, JAMES T. QUITTA and EDDY WELCH

Petitioners,

vs.

CAVENHAM FOREST INDUSTRIES, INC., CAVENHAM FOREST INDUSTRIES SALARIED EMPLOYEES VOLUNTARY SEPARATION SALARY CONTINUATION PLAN, TRUSTEES OF CAVENHAM FOREST INDUSTRIES SALARIES EMPLOYEES VOLUNTARY SEPARATION SALARY CONTINUATION PLAN, CAVENHAM FOREST INDUSTRIES RETIREMENT PLAN FOR SALARIED EMPLOYEES, TRUSTEES OF CAVENHAM FOREST INDUSTRIES RETIREMENT PLAN FOR SALARIED EMPLOYEES, CROWN ZELLERBACH CORPORATION, CROWN ZELLERBACH SALARIED EMPLOYEES INVOLUNTARY SEPARATION SALARY CONTINUATION PLAN, TRUSTEES OF CROWN ZELLERBACH SALARIED EMPLOYEES INVOLUNTARY SEPARATION SALARY CONTINUATION PLAN, CROWN ZELLERBACH RETIREMENT PLAN TRUSTEES OF CROWN ZELLERBACH RETIREMENT PLAN, JAMES RIVER CORPORATION OF NEVADA AND INDIVIDUAL EMPLOYEE/AGENTS OF CORPORATE DEFENDANTS AS YET UNKNOWN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Fifth Circuit err in deciding payment of severance benefits by a separate and distinct Cavenham Forest Industries Severance Plan relieved the Crown Zellerbach Severance Plan from its obligations to pay benefits to Beneficiaries who met all of the benefits eligibility requirements set forth in Crown Zellerbach's written ERISA plan document?

II. Did the United States Court of Appeals for the Fifth Circuit err in failing to award prevailing party beneficiaries costs and attorney's fees for expenses incurred in successfully convincing the Appellate Court to affirm, based on ERISA statutory grounds, the Trial Court's ruling below?

III. Under ERISA § 502(g)(1), does a presumption in favor of costs and attorney's fees flow to prevailing party beneficiaries who establish a wrongful denial of their benefits claims violated ERISA's statutory provisions?

IV. Did the United States Court of Appeals for the Fifth Circuit err in failing to find Beneficiaries established a violation of ERISA §§ 204(h) and 208, and further err by not remanding Beneficiaries claims to the District Court for relief necessary to remedy these ERISA Statutory violations?

V. Did the United States Court of Appeals for the Fifth Circuit err in not remanding Beneficiaries' claims to the trial court for consideration of Beneficiaries' claims for injunctive relief in light of its finding that a statutory ERISA violation occurred?

LIST OF PARTIES

The following are the parties to this proceeding:

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Robert E. Heinz
Plaintiff-Appellee-Cross Appellant

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Plaintiff-Appellee-Cross Appellant

Timothy H. Rush
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Cavenham Forest Industries Inc.
Defendant-Appellant

Cavenham Forest Industries Salaried Employees
Involuntary Separation Salary Continuation Plan
Defendant-Appellant

Trustees of Cavenham Forest Industries
Involuntary Salary Continuation Plan
Defendant-Appellant

Cavenham Forest Industries Retirement
Plan for Salaried Employees
Defendant-Appellant

Trustees of Cavenham Forest Industries
Retirement Plan for Salaried Employees
Defendant-Appellant

Crown Zellerbach Corporation, Defendant-Appellant

Crown Zellerbach Salaried Employees Involuntary
Separation Salary Continuation Plan
Defendant-Appellant

Trustees of Crown Zellerbach Salaried Employees
Involuntary Separation Salary Continuation Plan
Defendant-Appellant

Crown Zellerbach Retirement Plan, Defendant-Appellant

Trustees of Crown Zellerbach Retirement Plan
Defendant-Appellant

James River Corporation of Virginia, Defendant-Appellant

James River Corporation of Nevada
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Defendants-Appellan

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NO. 93-____

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Petitioners,

vs.

CAVENHAM FOREST INDUSTRIES, INC.,
CAVENHAM FOREST INDUSTRIES SALARIED EMPLOYEES
VOLUNTARY SEPARATION SALARY CONTINUATION PLAN, TRUSTEES
OF CAVENHAM FOREST INDUSTRIES SALARIED
EMPLOYEES VOLUNTARY SEPARATION SALARY
CONTINUATION PLAN, CAVENHAM FOREST
INDUSTRIES RETIREMENT PLAN FOR SALARIED EMPLOYEES,
TRUSTEES OF CAVENHAM FOREST INDUSTRIES RETIREMENT PLAN
FOR SALARIED EMPLOYEES, CROWN ZELLERBACH CORPORATION,
CROWN ZELLERBACH SALARIED EMPLOYEES INVOLUNTARY
SEPARATION SALARY CONTINUATION PLAN, TRUSTEES
OF CROWN ZELLERBACH SALARIED
EMPLOYEES INVOLUNTARY SEPARATION SALARY CONTINUATION
PLAN, CROWN ZELLERBACH RETIREMENT PLAN, TRUSTEES OF
CROWN ZELLERBACH RETIREMENT PLAN, JAMES RIVER
CORPORATION OF VIRGINIA, JAMES RIVER CORPORATION OF
NEVADA, AND INDIVIDUAL EMPLOYEE/AGENTS OF CORPORATE
DEFENDANTS AS YET UNKNOWN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DECISION BELOW

The Decision of the United States Court of Appeals for the Fifth Circuit, reported at 984 F.2d 686 (5th Cir. 1993), affirmed the District Court's grant of summary judgment to Plaintiffs on the issue of entitlement to enhanced pension benefits, and affirmed the District Court's grant of summary judgment to Defendants on the issue of Beneficiaries' entitlement to severance benefits from the Crown Zellerbach Severance Plan. The Fifth Circuit affirmed Beneficiaries' entitlement to enhanced pension benefits, but rejected the District Court's reasoning by finding, alternatively, that ERISA's statutory protections against the elimination of accrued benefits compels payment of Beneficiaries' enhanced retirement benefits. Despite this conclusion, however, the Fifth Circuit denied prevailing party Beneficiaries an award of attorneys' fees and costs for the appeal.

The District Court also granted summary judgment against Beneficiaries' on their claims for severance benefits from the Crown Zellerbach Severance Plan, despite Beneficiaries having met all eligibility requirements of the applicable plan document. The District Court ruled the obligation of the Crown Zellerbach Severance Plan to pay severance benefits was extinguished by Crown Zellerbach Corporation's transfer of the obligation to a successor employer, despite the fact that the Crown Zellerbach Severance Plan prohibited modification or cancellation of the promised severance benefits.

The successor employer, Cavenham Forest Industries, established its own ERISA severance plan. Beneficiaries also

met all of the eligibility criteria of the Cavenham Severance Plan. The CFI Severance Plan paid Beneficiaries in accordance with its written terms, and the benefits payments were based in substantial part upon years of service at C/Z. The District Court found payments by the CFI Severance Plan relieved the Crown Zellerbach Severance Plan of its obligation to pay benefits, to the extent benefits were paid by the Cavenham Forest Industries Plan, and further ruled the transfer of the obligations was not a modification or cancellation of the obligation of the C/Z Severance Plan. The Fifth Circuit affirmed on March 4, 1993 and subsequently modified its opinion on April 7, 1993.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 7, 1993. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES PRESENTED FOR REVIEW

The Employee Retirement Income Security Act, ("ERISA") § 504(g), (h), 29 U.S.C. § 1054(g), (h):

> **(g) Decrease of accrued benefits through amendment of plan**
>
> (1) The accrued benefits of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in § 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of --

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any

(A) tax credit employee stock ownership plan (as defined in § 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in § 2975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(h) Notice of significant reduction in benefit accruals

(1) A plan described in paragraph (2) may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to --

(A) each participant in the plan,

(B) each beneficiary who is an alternate payee (within the meaning of § 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of § 1056(d)(3)(B)(i) of this title), and

(C) each employee organization representing participants in the plan,

except that such notice shall instead be provided to a person designated, in writing, to receive such notice on behalf of any person referred to in subparagraph (A), (B), or (C).

(2) A plan is described in this paragraph if such plan is --

(A) a defined benefit plan, or

(B) an individual account plan which is subject to the funding standard of § 302.

The Employee Retirement Income Security Act, § 208, 29 U.S.C. § 1058:

> **Mergers and consolidations of plans or transfers of plan assets**
>
> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before of after the transaction are covered under a multiemployer plan to which subchapter III of this chapter applies.

The Employee Retirement Income Security Act, § 502(g), 29 U.S.C. § 1132(g):

> **(g) Attorney's fees and costs; awards in actions involving delinquent contributions**
>
> (1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k):

(k) Attorneys fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988(b):

(b) Attorney's fees

In any action or proceeding to enforce a provision of §§ 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Plaintiffs, six participants and beneficiaries of various ERISA employee benefits plans, provided by their former employers, Cavenham Forest Industries, Inc. (hereinafter "CFI") and Crown Zellerbach Corporation (hereinafter "C/Z"), sued on August 31, 1987 seeking enhanced severance and retirement benefits wrongfully denied them by Defendant employers and their ERISA plans. In 1988, the parties filed Cross-Motions for Summary Judgment. The Defendants claimed all the benefits sought by Plaintiffs, including enhanced retirement benefits under Supplement C to the C/Z Retirement Plan were severance benefits, both contingent and unaccrued. Defendants contended plan sponsor C/Z lawfully eliminated its ERISA plan obligations by transferring the obligation to pay those benefits from C/Z to

CFI. Defendants also claimed CFI as the sponsor of its newly created ERISA Plan, lawfully decided not to provide all the benefits due under the terms of the C/Z Plans.

Plaintiffs/Beneficiaries established they met all of the eligibility requirements contained in each written C/Z ERISA plan document. Plaintiffs/Beneficiaries claimed the elimination of the benefits provided by Supplement "C" to the C/Z Retirement Plan violated ERISA's vesting, accrual and non-forfeiture provisions[1], notice provision[2] and provisions governing the transfer of retirement plan obligations[3] Beneficiaries further claimed the unambiguous language of C/Z's plan documents prohibited the modification or cancellation of the benefits.

In 1988, the District Court incorrectly granted, in part, the CFI Defendants' Motion for Summary Judgment by ruling the enhanced retirement benefits were severance benefits not protected by ERISA § 204(g), 29 U.S.C. §1054(g). The Court, however, reserved for subsequent motion, or trial, the issue of whether C/Z's ERISA plan documents permitted the elimination of the benefits claimed by Beneficiaries.

On October 11, 1991, the District Court ordered the parties to file cross-motions for summary judgment on the issue of whether Plaintiffs were entitled to benefits under the plans. With this issue submitted on briefs, the District Court granted summary judgment in Plaintiffs/Beneficiaries' favor as to the enhanced pension benefits provided by Supplement "C" to the

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[1] ERISA § 204(g), 29 U.S.C. § 1054(g).

[2] ERISA § 204(h), 29 U.S.C. § 1054(h).

[3] ERISA § 208, 29 U.S.C. § 1058.

Crown Zellerbach Retirement Plan. The District Court ruled these benefits could not be eliminated because the plan documents prohibited modification or cancellation of benefits. The District Court denied Plaintiffs' entitlement to severance benefits from the C/Z Severance Plan, ruling C/Z transferred the obligation to pay those benefits to CFI, and that CFI's creation of a second severance plan, which paid severance benefits pursuant to a CFI plan document, relieved the C/Z Plan of any liability to pay Plaintiffs' severance benefits. These rulings were memorialized in a Memorandum Opinion filed December 18, 1991. **Appendix I.** Final Judgment was rendered in accord with that Order on March 9, 1992. The District Court's Final Judgment expressly reserved the issue of determination of costs and attorneys' fees until after review of the relevant legal issues by the Fifth Circuit. All parties filed timely Notices of Appeal.

On March 4, 1993, the United States Court of Appeals for the Fifth Circuit affirmed the trial court on all issues and denied Plaintiffs' claim for attorneys' fees and costs. The Fifth Circuit affirmed Beneficiaries right to receive Supplement "C" enhanced retirement benefits on ERISA statutory grounds and rejected the trial court's C/Z plan language rationale. The Fifth Circuit inexplicably failed to remand the case for appropriate injunctive relief in light of finding that a statutory violation occurred. On April 7, 1993, the Fifth Circuit issued a Modified Opinion in response to Plaintiffs' Petition for Rehearing, and remanded the issue of trial court attorney's fees and costs to the District Court. The trial court fee and costs issue is still pending in the Trial Court.

FACTUAL DISCUSSION

Beneficiaries are six former employees of Crown Zellerbach Corporation (hereinafter "C/Z"). In 1985, Crown Zellerbach Corporation was the target of a hostile takeover attempt. In

April of 1985, in response to the hostile takeover attempt, the C/Z Board of Directors adopted amendments to the C/Z Retirement Plan and to various other employee benefit plans. The intent of the amendments was to provide generous enhancements to C/Z's Severance and Retirement Plans. The C/Z Board approved the amendments to the various ERISA plans in its meeting on April 24, 1985. C/Z management drafted formal, written ERISA plan amendments to protect the enhanced pension and severance benefits from reduction or elimination. Pre-takeover C/Z management guaranteed to Beneficiaries in written ERISA plan documents their entitlement to receive enhanced severance and retirement benefits. The benefits were to be available to C/Z employees involuntarily separated by C/Z, or by a successor employer. Plan Sponsor C/Z intended these enhanced benefits would be available if any hostile takeover occurred. At this time, the C/Z Retirement Plan was "overfunded by approximately $70,000,000." Plan participants were provided ERISA-required summary plan descriptions, the terms of which are consistent with Beneficiaries' claims.

The eligibility provisions of the Crown Zellerbach Severance Plan in issue provide:

III. Change of Control/Restructuring Severance Program

A. Eligibility for Change of Control/Restructuring Severance Program

All active salaried employees of Crown Zellerbach and its U.S. subsidiaries as of April 1, 1985 who are Involuntarily Separated from Crown Zellerbach are eligible for Paid Terminal Leave under this Change of Control/Restructuring Severance Program except:

* * *

5. Employees who, in connection with the sale of an operation, are offered employment with a successor employer which acquires an operation, shall not receive benefits except in the event that such employees are Involuntarily Separated by the successor employer within two years from the Change of Control or within one year from the sale or other disposition of the subsidiary or division, whichever period ends first, in which case the employee will be entitled to the Salary Continuation provided in this Section III.

In July of 1985 a change of control, as defined in applicable ERISA plan documents occurred. Section III(D) of the C/Z Severance Plan provides "the benefits will be provided in the event of a change of control . . . unless they are modified or canceled prior to a change of control". In pretrial proceedings the parties stipulated the C/Z Severance Plan was not amended, modified or canceled prior to a change of control, and/or prior to each Plaintiff/Beneficiaries' "Involuntary Separation" by successor employer CFI.

On or about March 28, 1986, C/Z and CFI entered into an Employee Benefits Agreement. Defendants claim the Employee Benefits Agreement, extinguishes the C/Z Plan's obligations to pay benefits. The Employee Benefits Agreement does not amend C/Z's ERISA plans, nor could it do so under the terms of those plans. Under the Employee Benefits Agreement, CFI assumed the financial responsibility for funding or paying for certain benefits, and for indemnifying C/Z against employee benefit claims. The Employee Benefits Agreement is an agreement between corporate plan sponsor C/Z and corporate CFI. The Employee Benefits Agreement does not cancel the

provisions of any C/Z ERISA plan. The express terms of the Employee Benefits Agreement required a transfer of assets from the C/Z Retirement Plan to the CFI Retirement Plan. The Employee Benefits Agreement required inclusion of Supplement "C" enhanced pension benefits in the calculation of the sums to be transferred. The corporate plan sponsor C/Z failed and refused to transfer the assets in the manner specified by the Employee Benefits Agreement.[4] Corporate plan sponsor CFI refuses to this day to enforce the assets transfer provision of the Employee Benefit Agreement.

On or around May 5, 1986, Beneficiaries' employment with C/Z ceased and they automatically became employees of CFI, a new corporation created by a stock exchange transaction. This termination of employment did not trigger the benefits of the C/Z plans because each Beneficiary was offered employment with CFI.

Beneficiaries met the threshold eligibility requirements for receipt of benefits under the C/Z Severance Plan, because they were employed by Defendant Crown Zellerbach Corporation ("C/Z") as of April 1, 1985, as salaried employees.

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[4] If the transfer of assets had occurred in accordance with the terms of the Employee Benefits Agreement, no violation of ERISA § 208 would have occurred, because sufficient assets to cover each employees accrued benefits would have been transferred to the new CFI Retirement Plan. If the CFI plan had then immediately terminated, its beneficiaries would have received the same benefits they would have received had C/Z plan terminated immediately prior to the transfer of assets.

If the CFI Retirement Plan, after the transfer, had provided Supplement "C" level benefits to former C/Z employees meeting the C/Z Retirement Plan's pre-amendment eligibility requirement, then no violation of § 204(g) would have occurred.

The provisions of the C/Z Severance Plan were intended to, and did, apply to employees like Beneficiaries who were offered employment with a successor employer such as Defendant CFI. Each Beneficiary was "Involuntarily Separated" by CFI as described in the Severance Plan.[5]

The C/Z Severance Plan, because it was designed to protect employees from a predatory corporate raider, provided severance benefits to C/Z employees "Involuntarily Separated" by either C/Z or any successor employer to C/Z. By being "Involuntarily Separated" by successor employer CFI, within the window period, Beneficiaries fulfilled the last eligibility requirement for receipt of benefits under the C/Z Severance Plan.[6] Id. The C/Z Severance Plan was not amended, modified or canceled prior to each Beneficiary being "Involuntarily Separated". Neither C/Z, nor its ERISA severance plan, has paid Beneficiaries severance benefits.

Sometime after Defendants filed benefits claims, CFI created a second severance plan. Plaintiffs fulfilled all of the eligibility requirements for benefits from both the C/Z and CFI Severance Plans. Under the CFI Plan, Beneficiaries received some, but not all of the benefits promised by C/Z's Severance Plan. CFI has

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[5]Heinz, Harms and Rush were notified of their termination on September 15, 1986, Quitta on October 6, 1986, Welch on January 15, 1987 and Magee on February 23, 1987. Collectively Beneficiaries had over 141 years of service with C/Z. No Beneficiary was discharged for improper conduct.

[6] Eligibility for Supplement C enhanced retirement benefits was contingent only upon eligibility for C/Z severance benefits. Employees incurring an "Involuntary Separation" as described in the C/Z Severance Plan, including an "Involuntary Separation" by a successor employer, were eligible for the pension enhancements described in Supplement "C" to the C/Z Retirement Plan.

not paid the C/Z Severance Plan's obligation, because CFI's benefits payments were pursuant to the written terms of the separately established CFI Severance Plan. The C/Z Severance Plan has paid Plaintiffs no severance benefits, despite Beneficiaries having met all of the eligibility requirements for receipt of benefits.

In May of 1986, C/Z adopted Retirement Plan Amendments which retroactively (effective December 31, 1985), removed Beneficiaries from participant status in the C/Z Retirement Plan. CFI established its own Retirement Plan and retroactively (effective December 31, 1985) made Plaintiff/Beneficiaries participants in the CFI Retirement Plan. The CFI Retirement Plan did not provide Supplement "C" pension benefit enhancements. Beneficiaries were not given advance notice of the C/Z Retirement Plan amendments which (1) reduced their accrued benefits; and, (2) eliminated their accrual of future pension benefits. The failure to notify Beneficiaries is a "text-book" violation of ERISA § 504(h) 29 U.S.C. §1054(h), but the Courts below would not decide this issue, although it was squarely put before them.

The CFI Retirement Plan did not provide enhanced retirement benefits to former C/Z Retirement Plan participants who were involuntarily separated during the window period. The CFI Plan, however, in its 1986 and 1988 Internal Revenue Service Form 5500 returns, assured the IRS that enhanced retirement benefits would be provided former C/Z Retirement Plan participants involuntarily separated by CFI in the window period. Despite this, defendants refused to pay enhanced pension benefits until the United States Court of Appeals for the Fifth Circuit ruled the refusal to pay Plaintiffs/Beneficiaries enhanced retirement benefits violated ERISA § 504(g), 29 U.S.C. § 1054(g).

ARGUMENT

IMPORTANCE OF THE CASE

This case is of substantial monetary importance to Plaintiff/ Beneficiaries and many other participants and beneficiaries of the Crown Zellerbach Severance and Retirement Plans. This case raises fundamental questions as to whether a prevailing party beneficiary receives an adequate "make-whole" remedy in ERISA litigation when the judgment does not also contain an award of attorneys' fees and costs incurred for the issues on which beneficiaries have prevailed.

This case also raises fundamental questions concerning whether employers may modify or extinguish ERISA Severance Plan obligations when the express terms of the Plan prohibit modification or cancellation of promised benefits. This case raises additional novel and important ERISA issues concerning the manner in which a corporate plan sponsor may transfer the obligation to pay severance benefits from its plan to the separate severance plan of another entity. Each of these issues transcends the instant controversy.

The importance of the attorneys' fees issue is underscored by the various approaches taken by the courts of appeal concerning the appropriate standard by which to test prevailing party beneficiaries right to receive an award of attorneys' fees and costs. Congressional policy favoring uniform and consistent treatment of employee benefits issues is furthered by this Court's addressing and clarifying the circumstances under which a fee award is appropriate. Uncertainty as to the possibility of an award of attorneys' fees and costs discourages legitimate benefit claimants from pursuing meritorious litigation. Since ERISA limits the remedies available to beneficiary claimants to a "make-whole" remedy consisting of the benefits they are lawfully

entitled to obtain, a refusal to provide a fee award actually creates an incentive for plans and employers to wrongfully deny legitimate benefit claims. Since extra-contractual and compensatory damages are unavailable, the prospect of a large adverse judgment does not exist.[7] After weighing the number of law suits that may not be brought, a Machiavellian corporate plan sponsor acting as plan administrator may render a benefits denial not based upon the merits of the plan documents and issues, but instead based upon the impermissible criteria that a plan might successfully stone-wall a legitimate claimant. This risk looms large when, as in the instant case, the plan sponsor's human resources personnel render benefits eligibility decisions which risk being tainted by self-interest.[8]

This case is important also because the Fifth Circuit failed to remand the case to the trial court in light of its finding of the statutory violation. Unless remand is ordered, Beneficiaries are denied the opportunity to obtain appropriate injunctive relief.

The importance of this case is also underscored by public policy considerations. Beneficiaries, who prevail by proving a plan defendant violated express statutory provisions, act as private attorneys general. Where a participant or beneficiary prevails on statutory issues attorneys' fees and costs should be

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[7] ERISA does not authorize compensatory or punitive damages. ERISA broadly pre-empts state law remedies which otherwise would create economic incentives for competent counsel to champion victims of unlawful conduct. In the absence of a statutory award it is unlikely plan beneficiaries can obtain competent counsel particularly where payment by necessity must be a contingent percentage of an individual's retirement income.

[8] The record on summary judgment raised material factual issues as to the existence of a conflict of interest.

awarded, unless special circumstances render an award unjust. Under this rule, the wrongdoer pays unless it successfully overcomes its burden of justifying its conduct by special circumstances.

Fee awards to prevailing plaintiffs have long been the rule under the Civil Rights Act of 1964[9], and the Civil Rights Attorneys' Fees Act of 1976.[10] These statutes contain the exact discretionary fee language found in ERISA § 504(g) 29 U.S.C. 1132(g).

The importance of the severance benefit issue rests in the courts below permitting plan sponsors to modify or cancel obligations contrary to the written terms of the ERISA Plan document. As trust documents, ERISA plans, and their benefit obligations established by unambiguous terms should be protected from predatory poaching, particularly where the plan document contractually "vests" benefits by explicitly prohibiting modification or cancellation.

Prevailing party beneficiaries request this Court to effectuate the "make-whole" congressional intent behind ERISA. They therefore request that the Court grants a writ of certiorari and articulate uniform and dependable criteria for an award of attorneys' fees to prevailing party beneficiaries and to resolve the novel and important issues concerning the manner in which a plan sponsor may transfer the obligations contained in its ERISA Severance Benefits Plan.

THE CURRENT STATE OF THE LAW

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[9] 42 U.S.C. § 2000e-5(k).

[10] 42 U.S.C. § 1988(b).

ERISA is comprehensive, remedial legislation. In enacting ERISA, Congress expressly declared its purposes are "to protect... the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." ERISA § 2(b), 29 U.S.C. § 1001(b). In ERISA §502(a), 29 U.S.C. § 1132(a), Congress authorized civil actions by participants and beneficiaries on the grounds stated therein.

ERISA § 502(g), 27 U.S.C. § 1132(g)(1) is the attorney fee provision which states that in "any action under this subchapter... by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." As noted by one circuit court, there is no legislative history to § 502(g).[11]

Many of the courts of appeal have settled on a basic five factor test to determine when an ERISA litigant is entitled to attorney's fees.[12] As stated by the Fifth Circuit, which typifies the formulation, these factors are:

> In deciding whether to award attorneys' fees to a party under section 502(g), therefore, a court could consider such factors as the following: (1)

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[11] *Armistead v. Venritron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991).

[12] The D.C. Circuit has not decided whether to adopt the five factor test. *Great Washington Bd. of Trade v. District of Columbia*, 1992 W.L. 135563 (D.C. Cir. 1992).

> the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.[13]

However, the circuit courts have disagreed as to whether a prevailing "participant or beneficiary" should benefit from a rebuttable presumption of entitlement to attorneys' fees under Section 502(g).

The Eighth[14] and Ninth[15] Circuits have adopted a rebuttable presumption in favor of prevailing ERISA participants or beneficiaries entitling them to attorneys' fees under Section 502(g).[16] The First Circuit[17] has squarely rejected such a

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[13] *Ironworkers' Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). The five factor test apparently originated with the Tenth Circuit's decision in *Eaves v. Penn*, 587 F.2d 453 (1978).

[14] *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, (1980).

[15] *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984).

[16] The Second Circuit has not apparently resolved this issue yet although it has indicated Section 1132(g) should be "liberally construed to protect the statutory purpose of vindicated retirement rights, even when small amounts are involved." *Chambless v. Master, Mates & Pilots Pension Plan*, 815 F.2d 869, 872 (2nd Cir. 1987).

rebuttable presumption[18]. The Eleventh Circuit[19] seems to strongly lean against a presumption. The Sixth Circuit[20] has rejected a rebuttable presumption based on the facts of the case before it, but suggested that a different set of facts might result in a presumption in favor of prevailing plaintiffs.

The Third[21], Seventh[22] and Tenth[23] Circuits have essentially adopted the Fifth Circuit's statement in *Bowen* that a prevailing ERISA litigant is not "automatically" entitled to fees under Section 502(g). However, the Seventh Circuit has also indicated a "modest presumption" is applicable to ERISA

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[17] *Grey v. New England Telephone & Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986).

[18] The Fourth Circuit formerly recognized a presumption in *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1217-18 (1990), but retracted that recognition in *Quesinberry v. Life Ins. Co. of N. America*, 987 F.2d 1017 (1993) (en banc).

[19] *McKnight v. Southern Life and Health Ins.*, 758 F.2d 1566 (11th Cir. 1985).

[20] *Vernitron*, supra at 1305.

[21] *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3rd Cir. 1993).

[22] *Janowski v. Int'l Brotherhood of Teamsters, Local 710*, 673 F.2d 931 (7th Cir. 1982), *vacated on other grounds*, 463 U.S. 1222 (1983).

[23] *McGee v. Equicor-Equitable HCA Court*, 953 F.2d 1192 (10th Cir. 1992).

attorney fee assessments based on a finding of statutory violations.[24]

I. Fifth Circuit Error In Light of Congressional Policy and the Law of the Circuits and Supreme Court.

A. The Attorneys' Fees Issues

Beneficiaries who successfully sue a plan for benefits payments wrongfully denied are deprived of a "make-whole" remedy unless beneficiaries are awarded the costs and attorney's fees required to litigate their entitlement to the rights wrongfully denied. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) provides a court, in its discretion, may award reasonable attorney's fee and costs to either party. The Eighth and Ninth Circuits[25] have adopted a rule of presumption in favor of an award of attorney's fees to prevailing beneficiaries. The Fifth Circuit rejects any presumption in favor of an attorney's fees award to prevailing beneficiaries. Beneficiaries maintain this is bad ERISA policy and contrary to the "make-whole" remedy philosophy underlying the Act. When beneficiaries vindicate important statutory rights the fault for the wrongdoing lies squarely upon the plan's conduct which violates ERISA. By resorting to presumptions favoring fee awards, a court fairly places upon the culpable party the burden of coming forward and justifying its wrongful conduct.

The Fifth Circuit's denial of a fee award to beneficiaries for their success on appeal conflicts squarely with a Seventh Circuit Opinion arising in substantially the same fact pattern. In *Production & Maintenance Employees Local 504 v. Roadmaster*

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[24] *Production & Maintenance Employees Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992).

[25] See page 8; supra.

Corp,[26] the employer retroactively amended its pension plan to reduce accrued benefits in violation of ERISA § 204(g). The employer notified the union of the retroactive plan amendment, but failed personally to notify individual beneficiaries. The Court concluded this conduct violated ERISA § 204(g) and the mandatory notice provisions of Section 204(h).

In the instant case C/Z retroactively amended its pension plan to remove Beneficiaries from participant status. The remaining C/Z plan participants who were involuntarily separated continued to receive enhanced Supplement "C" retirement benefits from the C/Z Retirement Plan. The CFI plan did not provide any enhanced retirement benefits. The May 1986 Amendment was made retroactively effective as of January 1, 1986. The amendment, if effective, retroactively stripped Beneficiaries of accrued benefits and the future right to accrue benefits under the C/Z Retirement Plan. C/Z's conduct violated ERISA §§ 204(g), 204(h) and 208, because it caused a reduction of Supplement "C" benefits which must be treated as if they are accrued for purposes of each of these ERISA sections.

Defendants admit Beneficiaries received no formal notice from C/Z in May of 1986, or thereafter, of the May 1986 Amendment to the C/Z Retirement Plan. The parties further agree Beneficiaries received no written notice from C/Z, or from any C/Z ERISA fiduciary, of any post-transaction [May 6, 1986], modification or elimination of Supplement "C" benefits. ERISA § 204(h) required 15 days advance notice of a plan amendment which causes "a significant reduction in the rate of future benefit accruals."

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[26] 954 F.2d 1397, 1405 (7th Cir. 1992).

> [A]n amendment reducing the rate of future benefit accruals adopted without proper notice under section 204(h) is ineffective.[27]

In specifically addressing the attorneys' fees issue, the *Roadmaster* court noted:

> [I]f the section 204(h) question is dispositive, there is no substantial justification for litigating without a solid defense to that claim, no matter how compelling Roadmaster's section 204(g) arguments might be (although we are not saying that those arguments actually are compelling.)

Id. Thus, the *Roadmaster* court concluded defendants had litigated the Section 204(h) issue without substantial justification, despite the fact that the *Roadmaster* defendants had actually notified the union, but failed to notify individual employees. This conclusion lead the court to award fees for the appeal. Crown Zellerbach, however, utterly failed and refused to comply with the notice requirements of ERISA § 204(h), and gave no explanation for their failure in that regard. Violations of either ERISA §§ 204(g) or 204(h) render the 1986 Amendment invalid and ineffective, a result which requires payment of Supplement "C" benefits to Beneficiaries, and the many other similarly situated Beneficiaries who met all of the eligibility requirements of Supplement "C". Plaintiffs have substantially prevailed by enforcing ERISA's substantive provisions. C/Z's conduct is far more egregious and culpable than that of the *Roadmaster* Defendants, since no notice was given, the amendments were

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[27] *Production & Maintenance Employees Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405, (7th Cir. 1992).

retroactive, and defendant's did not even comply with the terms of the Employee Benefit Agreement.

In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), plaintiffs prevailed under Title II of the 1964 Civil Rights Act. The appeals court remanded the attorneys' fees issue with instructions to award attorneys' fees only to the extent defendants had advanced defenses "for the purpose of delay and not in good faith." This Court reversed, holding prevailing parties who act as private attorneys general should be awarded fees, unless special circumstances would render an award unjust.

In this case the Fifth Circuit remanded the fee issue strongly implying bad faith is required before an attorney fee award would be appropriate. Setting aside the issue as to whether the Fifth Circuit improperly prejudged the attorneys' fees issue[28], prevailing Beneficiaries believe the Fifth Circuit erred as a matter of ERISA policy, and said error is in conflict with the previous decision of this Court interpreting similar statutory fee provisions under other employment statutes requiring "make-whole" remedies.

Although ERISA's legislative history does not expressly evidence congressional intent surrounding adoption of ERISA's attorneys' fees provision, the discretionary language chosen was adopted after this Court's *Piggie Park* decision which provided prevailing plaintiffs broad entitlement to a fee award. This Court has already extended the *Piggie Park* rationale to suits arising out

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[28] Because application of the *Bowen* five factor test is in part fact driven, Beneficiaries believe the court below erred in deciding the appellate court fee issue adverse to them before they were permitted to meet their evidentiary burdens in the trial court under the test.

of Title VII of the Civil Rights Act of 1964[29] and the Civil Rights Act of 1976[30] In each of these circumstances, the same statutory language authorizing a "discretionary" award of attorneys' fees has been defined broadly to require a fee award to prevailing plaintiffs who acted as a private attorneys general in vindicating statutory rights, absent "special circumstances."

The instant beneficiaries have successfully acted as private attorneys general by establishing substantive ERISA violations occurred and by obtaining broad relief benefiting a group of similarly situated beneficiaries.

Where ERISA prevailing party beneficiaries successfully press statutory grounds for relief, an award of fees and costs for their efforts should be presumptively appropriate absent special circumstances.[31]

Defendants claim the transfer of obligations to CFI relieves them of compliance with ERISA's statutory mandates. The facts underlying this claim establish Defendants' improper conduct. ERISA § 208 governs the transfer of assets. 29 U.S.C. § 1058. Section 208 requires a transfer of the present value of all

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[29] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

[30] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980).

[31] A distinction can be drawn between a claim which is predicated upon a defendant's wrongful plan interpretation and, a claim like the instant one, which is predicated upon violation of federal law. In the latter case beneficiaries are acting as private attorneys general vindicating Congressional policy, and benefiting others who are non-parties.

accrued benefit values to the new plan.[32] C/Z did not transfer funds to cover Beneficiaries' accrued rights under Supplement "C". Consequently, the purported Section 208 transfer was handled in an unlawful manner. Compounding this statutory wrong is the fact that defendants failed to transfer the assets as required by the Employee Benefits Agreement. Had Defendants complied with their own Employee Benefits Agreement the transfer would have included sufficient assets to comply with ERISA § 204(g), and would have included as accrued benefits plaintiffs' Supplement "C" enhancements.[33] The Fifth Circuit also erred by not remanding to the trial court Beneficiaries' claims for injunctive relief which the trial court incorrectly dismissed as moot.

Lastly, in weighing the attorney's fees issue, the Fifth Circuit panel relied upon *Iron Workers v. Bowen*[34], but misapplied the *Bowen* test in a manner inconsistent with the remedial purposes of ERISA. Curiously, the Fifth Circuit suggests merely benefitting a class of similarly situated beneficiaries is an insufficient basis upon which to conclude Beneficiaries sought to benefit plan participants other than themselves. Beneficiaries have righted statutory violations, a result of which benefits a large number of non-parties. Had the Fifth Circuit properly remanded the case for appropriate injunctive relief, including an ordered transfer of funds in compliance with the Employee

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[32] *Koch Industries, Inc. v. Sun Co., Inc.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990)

[33] The Employee Benefit Agreement specifically defined the accrued benefits values to be transferred from the C/Z Retirement Plan to the CFI Retirement Plan to include the value of all supplements and subsidized benefits.

[34] 624 F.2d 1255 (5th Cir. 1980)

Benefit Agreement, all CFI plan participants and beneficiaries would have been better off. A failure to grant an award of fees and costs produces an anomalous windfall to non-parties who directly benefit, but have no obligation to pay fees or costs. After the Fifth Circuit's ruling Defendants voluntarily began paying benefits to these non-parties.

Secondly, the Fifth Circuit erred as a matter of law when it concluded Plaintiffs/Beneficiaries did not resolve a significant legal question regarding ERISA. When this case began no court had interpreted amended Section 504(g). Plaintiffs have clarified its impact and application to enhancements paid as part of a golden parachute severance package.

Third, the Fifth Circuit also erroneously concluded the legal issues involved are "close ones." They are not. The legislative history of amended Section 504(g) carefully explains that retirement enhancements like Supplement "C" are protected from retroactive elimination by plan amendment. In fact, in the legislative history a specific example establishes undiscounted retirement benefits like Supplement "C" are protected from reduction by plan amendment. Similarly the ERISA §204(h) notice violation is not a close question. The statute requires notice, but none was given. Finally, the closeness of the question must be analyzed in light of the fact the Employee Benefits Agreement, by its unambiguous terms, defined Supplement "C" benefits to be accrued benefits and required the C/Z Retirement Plan to transfer to the CFI Retirement Plan assets sufficient to cover beneficiaries claimed pension enhancements. However, Defendants failed and refused to honor or enforce their rights and responsibilities under the Employees Benefit Agreement. Defendant CFI also affirmatively misrepresented to the IRS that its plan would pay the enhanced pension benefits defendants sought. Had this misrepresentation not occurred, Beneficiaries may not have had to pursue defendants as private attorneys general, because the IRS would have pursued them.

The Fifth Circuit's conclusion that the legal issue involved is a close one, is also flawed because it is predicated upon a manifest error of fact. The Fifth Circuit erroneously concluded Supplement "C" was eliminated by the May 1986 Amendment to the C/Z Plan. This purported ultimate factual predicate is incorrect as a matter of law and contrary to the stipulated facts. The 1986 Amendments to the C/Z Retirement Plan attempted to eliminate Plaintiffs from participant status in the C/Z Retirement Plan, they did not eliminate Supplement "C". Furthermore, the parties stipulated CFI did not eliminate, modify or amend C/Z's Plans.

Assuming the 1986 Amendment was lawful under ERISA, its effect was not to eliminate Supplement "C", but rather to remove Beneficiaries, and all other former C/Z employees who accepted employment with CFI, from participant status in the C/Z Plan. After May of 1986, Supplement "C" remained a viable part of the C/Z Retirement Plan. The C/Z Plan continued to provide Supplement "C" benefits to employees involuntarily separated for up to a least a year later than May of 1986. Because it incorrectly concluded Supplement "C" was eliminated, the Fifth Circuit erroneously concluded the trial court's basis for awarding the enhanced retirement benefits was incorrect. Because Supplement "C" was not eliminated, Beneficiaries' entitlement to Supplement "C" benefits under the trial court's plan interpretation analysis should have been affirmed. Thus, the Fifth Circuit incorrectly rejected the trial court's *ratio decidendi.*

B. The C/Z Severance Plan Issues

The Fifth Circuit ruled plan sponsor Crown Zellerbach Corporation could extinguish the benefits obligations of the C/Z Severance Plan by entering into an Employee Benefits Agreement which transferred the obligation to pay for the benefits provided by the C/Z Severance Plan to a successor employer, CFI. The Fifth Circuit approved the extinguishment of the C/Z Severance Plan's severance benefit obligation, despite

the fact that the C/Z Severance Plan prohibited cancellation or modification of benefits provided by it, and despite the fact that Beneficiaries had fulfilled each of the eligibility criteria contained in the written C/Z Severance Plan document.[35]

The C/Z Severance Plan is an ERISA plan separate and distinct from the CFI Plan which paid a CFI severance plan benefit to Beneficiaries. When CFI set up a separate ERISA Plan it erred. By setting up its own separate severance plans, CFI created a second severance entitlement. While C/Z could permissibly transfer the obligation to pay benefits under its plan to CFI, CFI acting prudently should have merely reimbursed C/Z for the sums paid out by the C/Z Severance Plan rather than establishing a separate severance plan which created independent obligations of its own. Irrespective of what obligations are paid by the CFI Plan, the C/Z Severance Plan obligation to Beneficiaries exists and is unfulfilled.

Beneficiaries have fulfilled each of the criteria for eligibility under both the C/Z and CFI ERISA severance plans. While it may be true that corporate C/Z and corporate CFI could transfer the ultimate responsibility for funding of the benefits owed by the C/Z Plan, they could not cancel or modify the C/Z Plan's

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[35] ERISA Section 208, 29 U.S.C. § 1058, and applicable IRS regulations carefully delineate the manner in which defined benefit retirement plans may transfer pension obligations. No such statutory authority regulates the transfer of severance obligations. In the normal situation where the severance plan document does not expressly prohibit modification or cancellation, a plan sponsor may unilaterally terminate the plan, because ERISA does not statutorily prohibit modification or elimination of severance plan obligations. Consequently any limitation upon a plan sponsor's authority must come from the applicable ERISA severance plan document. Here the pre-takeover C/Z Board imposed such limitation as an integral part of its severance plan document. The courts should enforce the restrictions adopted by the plan sponsor.

obligation to Beneficiaries to pay benefits pursuant to the written plan document. ERISA plans, once established, are trust documents which have a legal life of their own. Each severance plan constitutes a separate trust creating separate obligations. If a written severance plan's terms prohibit modification, a corporate plan sponsor cannot unilaterally extinguish a plan obligation by simply transferring the obligation to another corporate entity.

Defendants complained below that payment of benefits from the C/Z Severance Plan would constitute a windfall double recovery. This is not true. Since Plaintiffs met the eligibility requirements for two separate plan documents, a single recovery from two separate plans was mandated by the eligibility criteria of the two different plan documents. In order to overcome a motion for summary judgment on this issue, Plaintiffs properly placed in question whether or not such a windfall was actually contemplated by the pre-takeover C/Z, the corporate plan sponsor which implemented the C/Z Severance Plan.

The court below held the Employee Benefits Agreement transferred all of C/Z's employee benefits obligations to CFI. That finding is incorrect. The Employee Benefits Agreement merely makes CFI financially responsible to pay the benefits C/Z has promised. CFI was under no obligation to establish a second severance plan. CFI could have easily fulfilled its obligations under the Employee Benefits Agreement without establishing a second severance plan. To effectuate the obligations of the Employee Benefits Agreement, the C/Z Severance Plan should have paid Beneficiaries' severance benefits and CFI should have simply reimbursed plan sponsor C/Z for payments made under the C/Z Severance Plan.

The Employee Benefits Agreement is between corporate C/Z and corporate CFI. The C/Z and CFI Severance Plans are not parties to the Employee Benefits Agreement. The Plans themselves are separate trust agreements. The Employee

Benefits Agreement is binding "solely on the parties"[36] and infers no third party rights. In short, the Employee Benefits Agreement does not affect, modify or amend the unambiguous obligations set forth in the two ERISA severance plans.

The Defendant Plans complain about the natural effects of their own deliberate actions. Defendants persuaded the Courts below to reach a result based upon equitable considerations. Equitable considerations are an inappropriate basis for judicially amending unambiguous ERISA plan documents. The superficial equitable appeal of Defendants' position is also undercut by two facts: CFI's Severance Plan was created with the full knowledge of Beneficiaries' claims. Second, the CFI Plans were created for the wrongful purpose of avoiding Plaintiffs' claims for enhanced pension benefits. Beneficiaries asserted these positions below and properly raised these disputed material facts.[37]

These fact-driven are sufficient to preclude summary judgment in Defendants' favor on Beneficiaries' claims against the C/Z Severance Plan.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, and the Petitioner accordingly so prays.

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[36] The parties to the Employee Benefits Agreement are Crown Zellerbach Corporation and Cavenham Forest Industries. The ERISA plans are not parties to the Employee Benefits Agreement.

[37] Despite this issue being placed before the Trial Court and the Fifth Circuit, neither Court acknowledged this issue.

Respectfully submitted,

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NORMAN A. MOTT III

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CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been duly mailed to counsel for the Respondents as follows:

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APPENDIX I

MINUTE ENTRY
SEAR, J.
DECEMBER 16, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAN C. HARMS, ET AL * CIVIL ACTION

VERSUS * NO. 87-4068

CAVENHAM FOREST INDUSTRIES, INC., ET AL * SECTION "G"

MEMORANDUM AND ORDER

Plaintiffs, Jan C. Harms, Robert E. Heinz, Sue C. Magee, Timothy H. Rush, James T. Quitta and Eddie Welch, filed this ERISA action seeking to collect, among other things, employee benefits allegedly due to them under the Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan and Supplement C to the Crown Zellerbach Retirement Plan.

Named as defendants are Cavenham Forest Industries, Inc., Cavenham Forest Industries Salaried Employees Involuntary Separation Salary Continuation Plan, Trustees of Cavenham Forest Industries Salaried Employees Involuntary Separation

Salary Continuation Plan, Cavenham Forest Industries Retirement Plan for Salaried Employees, Trustees of Cavenham Forest industries Retirement Plan for Salaried Employees, Crown Zellerbach Corporation, Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan, Trustees of Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan, Trustees of Crown Zellerbach Retirement Plan, James River Corporation of Virginia, James River Corporation of Nevada, and individual employees/agents as yet unknown of the above named corporate defendants. Plaintiffs invoke the court's federal question jurisdiction.

Facts

Plaintiffs are former employees of Crown Zellerbach ("C/Z") and Cavenham Forest Industries, Inc. ("CFI"). In an effort to defeat a takeover, Crown Zellerbach developed for its employees an enhanced severance of employment program known as the C/Z Change of Control/Restructuring Severance Program ("the C/Z Severance Program"). The C/Z Severance Program is an addition to the Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan (the "Involuntary Separation Plan") and is Part III of that plan. In conjunction with the addition of [sic] the Severance Program, C/Z made an addition to another, separate plan, the Crown Zellerbach Retirement Plan. That addition is referred to as Supplement C to the C/Z Retirement Plan ("C/Z Supplement C"). The effective date of both additions was April 1, 1985.[1] Plaintiffs were employed by C/Z as of that date.[2] Participants, such as plaintiffs, became eligible for the benefits provided by

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[1]Uncontested Material Fact Nos. 2-3, filed Sept. 27, 1991.

[2]Uncontested Material Fact No. 9.

these additions only in the event a "change in control" of C/Z occurred.[3]

In July 1985, a "change of control" of C/Z, as defined in the C/Z Severance Program, did occur.[4] In conjunction with the change in control of C/Z, the various operations of C/Z were ultimately split, sold and/or taken over by several other companies. In particular, CFI acquired C/Z's Timber and Wood Products Operation. CFI offered employment to plaintiffs. Plaintiffs became employed by CFI on May 5, 1986.[5] CFI implemented retirement and severance plans of its own with an effective date of January 1, 1986. Within one year, plaintiffs were involuntarily separated by[6] and received benefits pursuant to the CFI severance plan.[7]

Plaintiffs claim benefits are owed to them under the C/Z Severance Program and Supplement C and that their benefit claims were denied.[8] Plaintiffs and defendants were ordered to file motions for summary judgment on plaintiffs' entitlement to benefits under the Crown Zellerbach Plans.

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[3]See C/Z Retirement Plan, Supplement C, § 1 and § 2(a) (attached hereto as Exhibit No. 2); C/Z Involuntary Separation Plan, § IV(D) and § III(A)(5) (attached hereto as Exhibit No. 1).

[4]Uncontested Material Fact No. 13. A Change in Control is defined in the C/Z Involuntary Separation Plan § IV(A) (Exhibit No. 1).

[5]Uncontested Material Fact No. 36.

[6]Uncontested Material Fact No. 41.

[7]Uncontested Material Fact No. 49.

[8]It is unclear who actually denied plaintiffs' claims.

Standard of Review

The Supreme Court has held that an action challenging denial of benefits based on an employee benefit plan interpretation "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[9] The Crown Zellerbach plans do not give the administrator or fiduciary discretionary authority.[10] Accordingly, a de novo review is required.

Analysis

I. The Severance Program

Plaintiffs claim benefits are owed pursuant to the terms of the C/Z Involuntary Separation Plan. This plan is a severance program created "to provide salary continuation for eligible salaried employees who are involuntarily separated from employment."[11] Within this Plan, there are two severance programs: the "Basic Severance Program" found in section II and "Change of Control/Restructuring Severance Program" (referred to here as "the Severance Program") found in section

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[9] *Tire and Rubber Co. v. Bruch [sic]*, 109 S.Ct. 948, 956 (1989). *See also, Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991) (holding that, in light of the *Bruch* [sic] decision de novo standard is appropriate for review of plan term interpretations, yet arbitrary and capricious standard appropriate for review of factual determinations).

[10] The parties agree that the plans "themselves contain no language specifically delineating the role or authority of the plan fiduciaries." Uncontested Material Fact No. 34.

[11] C/Z Involuntary Separation Plan § I (Exhibit No. 1).

III. Both programs provide a benefit called "Paid Terminal Leave." "Paid Terminal Leave" is defined as "leave of absence during which time the employee receives compensation but is not an active employee and does not have an assigned position and is not expected to return to work,"[12] Plaintiffs seek "Paid Terminal Leave" as provided in Section III, the Severance Program.

> Section III(A)(5) of the Severance Program provides that:
>
> All active salaried employees of Crown Zellerbach ... are eligible for Paid Terminal Leave ... except:
>
> 5. Employees who, in connection with the sale of an operation, are offered employment with a successor employer which acquires an operation shall not receive benefits except in the event that such employees are Involuntarily Separated by the successor employer within two years from the Change in Control or within one year from the sale or other disposition of the subsidiary or division, whichever period ends first, in which case the employee will be entitled to the Salary Continuation provided in this Section III.[13]

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[12] Id. at § IV(G).

[13] Id. § III(A)(5).

The parties agree that this section applies to plaintiffs.[14] Plaintiffs indeed do satisfy the conditions of this section: Plaintiffs were employees of C/Z who were offered employment with CFI, a successor employer, and they were involuntarily separated by a successor employer within the applicable window period, i.e., within two years of the change of control and within one year of the sale of the operation.[15] Thus, plaintiffs are entitled to "the Salary Continuation provided in this Section III." Although the definition section of the Involuntary Separation Plan does not define the term "Salary Continuation," Section III provides for only one benefit, "Paid Terminal Leave." Paid Terminal Leave is the eligible participant's salary calculated for a fixed number of weeks.[16] In essence, Paid Terminal Leave is a continuation of an employee's salary; thus, the reference to "Salary Continuation." Accordingly, Salary Continuation is synonymous with Paid Terminal Leave. CFI contends that plaintiffs already have received these benefits.

Prior to the sale of C/Z's Timber and Wood Products Operations to CFI, C/Z and CFI entered into [sic] an Employee Benefits Agreement.[17] Pursuant to this agreement, CFI assumed the liability for severance benefits payable to "CFI Employees."[18] "CFI Employees," as that term is used in the

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[14]Uncontested Material Fact No. 7.

[15]Uncontested Material Fact No. 41.

[16]C/Z Involuntary Separation Plan § III(B) (Exhibit No,. 1).

[17]Uncontested Material Fact No. 19; Employee Benefit Agreement (attached hereto as Exhibit No. 3).

[18]Employee Benefits Agreement p. 5 (Exhibit No. 3).

Employee Benefits Agreement, includes plaintiffs.[19] CFI contends that, in assuming C/Z's benefit obligations, it incorporated the C/Z Paid Terminal Leave benefits into its severance plan. Further, CFI contends its severance plan parallels C/Z's. CFI paid plaintiffs pursuant to its severance plan. Thus, CFI contends that the payment received from CFI satisfied C/Z's obligation.

Plaintiffs contend that the CFI severance plan is a separate and distinct plan and that plaintiffs are entitled to benefits under both the CFI and C/Z plans. Plaintiffs rely on a provision in the C/Z Severance Program that prohibits any modification or cancellation of the Severance Program after a change in control occurs.[20] Plaintiffs consider CFI's attempt to implement its own severance plan as a substitute for C/Z's Severance Program a prohibited modification or cancellation. According to the plaintiffs, CFI's severance plan simply is a separate plan and they are entitled to benefits under both the CFI and C/Z plans.

There is no provision in the C/Z Severance Program that prohibits the transfer of C/Z's obligation to pay severance benefits to another entity. A transfer of the obligation or

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[19]"CFI Employees" includes "any employee of Crown or an affiliated company who is not employed by or in connection with the CFI Businesses or the Energy Properties as of the Effective Date but who, with the consent of CFI, becomes an employee of CFI ... within 60 days after the Effective Date." Id. p. 2.

[20]C/Z Involuntary Separation Plan § III(D) (Exhibit No. 1) which states: "The Change of Control/Restructuring Severance Program described above may be modified or canceled at any time prior to a Change of Control. The benefits will be provided in the event of a Change of Control or restructuring, unless they are modified or canceled prior to a Change of Control."

liability is not a cancellation or modification of benefits. On the other hand, CFI cannot substitute its plan for the C/Z Severance Program if it in any way alters the C/Z Severance Program. That action would be a modification prohibited by the plain language of the C/Z Severance Program.[21] It is acceptable for CFI, in assuming C/Z's benefit obligations, to institute a plan that provides the same benefits as the C/Z Severance Program and actually compensate plaintiffs for these benefits through its own plan. Plaintiffs, however, cannot collect the full benefits provided in both the CFI severance plan and the C/Z Severance Program.

II. Supplement C

Plaintiffs also seek benefits pursuant to Supplement C of the C/Z Retirement Plan. The C/Z Retirement Plan provides a "Retirement Benefit," which refers to "a Participant's Normal Retirement Benefit, Early Retirement Benefit, Disability Retirement Benefit or Vested Benefit."[22] Supplement C of the Retirement plan "provide[s] special benefits in lieu of Early Retirement Benefits and Vested Benefits to eligible Participants who are involuntary separated under the Severance Program."[23] This language in Supplement C prevents plaintiffs from receiving the Early Retirement Benefits or the Vested Benefits provided in the C/Z Retirement Plan. Yet, the benefits provided in

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[21]The C/Z Involuntary Separation Plan permits modification only prior to a Change in Control. A Change in Control occurred in April 1985. The CFI Severance Plan was instituted during 1986, after the Change of Control.

[22]C/Z Retirement Plan § 24(hh) (Exhibit No. 2).

[23]C/Z Retirement Plan: Supplement C § 1 (Exhibit No. 2) (emphasis added).

Supplement C of the C/Z Retirement Plan in no way affect the Paid Terminal Leave benefit provided by the Severance Program, which is part of the Involuntary Separation Plan, a separate and distinct plan.

To receive the benefits provided in Supplement C, the participant must be Involuntarily Separated on or after April 1, 1985 under the Severance Program.[24] Supplement C provides that "[c]apitalized terms used in ... Supplement C and not defined ... have the same meanings as in the Plan or the Severance Program."[25] The "Plan" refers to the Retirement Plan[26] and the "Severance Program" refers to the "Change in Control/Restructuring Severance Program which is part of the Crown Zellerbach Salaried Employees Involuntary Separation Salary Continuation Plan" (i.e., the Severance Program discussed above).[27] Neither Supplement C nor the Retirement Plan define "Involuntary Separation," but the Severance Program does. "Involuntary Separation" means "involuntary termination of employment by Crown Zellerbach ... and, in cases described in IIIA5 and IIIB4, by successor employers."[28] Because Supplement C benefits arise when a participant is involuntarily separated under the Severance Program and plaintiffs were involuntarily separated, pursuant to the conditions of IIIA5,[29]

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[24] Id. §§ 1, 3.

[25] Id. § 1.

[26] C/Z Retirement Plan § 1.

[27] C/Z Retirement Plan: Supplement C § 2 (Exhibit No. 2).

[28] C/Z Involuntary Separation Plan § IV(D) (Exhibit No. 1).

[29] *See supra* p. 4.

after April 1, 1985, by a successor employer, plaintiffs are entitled to Supplement C benefits.

Defendants suggest that under the C/Z Severance Program, plaintiffs are limited to salary continuation benefits (i.e., those benefits discussed in section I of this memorandum). They rely on Section III(A)(5) of the Involuntary Separation Plan which states that employees such as plaintiffs "will be entitled to the Salary Continuation provided in this Section III." That language serves to grant plaintiffs benefits under the Involuntary Separation Plan. This language does not expressly or implicitly exclude other benefits, in particular, it does not deny plaintiffs benefits under Supplement C, found in the Retirement Plan.

Defendants also rely on my October 26, 1988 memorandum and order. At that time, I found that Supplement C benefits were employee welfare benefits which, under ERISA, could be terminated prior to the qualifying event requiring payment. Apparently, in October 1988, CFI argued that it terminated Supplement C benefits in May of 1986, prior to plaintiffs involuntary separation.[30] Although ERISA did not prohibit termination of Supplement C, the language the C/Z Severance Program did. The Involuntary Separation Plan provides: "The Change of Control/Restructuring Severance Program described above may be modified or canceled at any time prior to a Change of Control. The benefits will be provided in the event of a Change of Control or restructuring, unless they are modified or canceled prior to a Change of Control." Supplement C of the C/Z Retirement Plan was adopted as part of the C/Z Severance

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[30]Memorandum and Order, Oct. 26, 1988, p. 3.

Program.[31] The quoted provision prohibited modification or cancellation of Severance Program benefits after a Change of Control. Thus CFI could not cancel or terminate Supplement C after the change in control, which occurred in April 1985. CFI did not control or own C/Z until after the change in control. Accordingly, it could not terminate or cancel Supplement C benefits. To do so would have violated the plain language of the Severance Program. Thus, plaintiffs are entitled to Supplement C benefits as provided in the Retirement Plan.

Plaintiffs' motion for summary judgment advances several other theories of recovery. Because they exceed the scope of the Court's October 11, 1991 Order, I have not considered these arguments. Should plaintiffs desire to do so, they may submit another motion for summary judgment advancing these theories.

Accordingly,

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED in part, in that plaintiffs are entitled to benefits under the C/Z Involuntary Separation Plan and Supplement C.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED in part, in that plaintiffs cannot collect full benefits under both the C/Z Involuntary Separation Plan and the CFI severance plan.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

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[31]Uncontested Material Facts No. 4. *See also* Defendants' memorandum in support of motion for summary judgment, p. 6-7.

APPENDIX II

Jan C. HARMS, et al., Plaintiffs-Appellees-Cross Appellants,

v.

CAVENHAM FOREST INDUSTRIES, INC., et al., Defendants-Appellants-Cross Appellees.

No. 92-3321.

United States Court of Appeals,

Fifth Circuit.

March 4, 1993.

As Amended on Denial of Rehearing

April 7, 1993.

Employees brought action against their former employer under Employee Retirement Income Security Act (ERISA), seeking to establish their entitlement to certain severance and pension benefits following their termination. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, Chief Judge, entered summary judgment in favor of employees, and employer appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) employees who received benefits pursuant to their employer's severance plan were also eligible to supplemental retirement benefits under plan adopted by employer's predecessor; (2) predecessor employer's special early retirement benefits plan was protected from subsequent modification under ERISA; (3) employees who were beneficiaries under successor employer's separate severance pay plan were not also entitled to benefits under predecessor employer's severance plan; (4) employees' state law claims were

preempted by ERISA; and (5) employees were not entitled to award of attorney's fees for expenses incurred on appeal.

Affirmed.

[1] FEDERAL COURTS k776

On appeal of district court's grant of summary judgment, Court of Appeals reviews de novo court's application of law to evidence adduced before it.

[2] FEDERAL COURTS k776

In cases involving interpretation of ERISA-covered benefit plan, Court of Appeals construes terms of plan de novo, unless plan gives administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of plan. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

[3] PENSIONS k26, 139

In interpreting ERISA-covered benefit plan, Court of Appeals must look to plan language as guide to its de novo interpretation, buttressed only by admissible evidence as to settlor's intent where plan terms are ambiguous; Court must defer, however, to plan fiduciary's factual determinations made in course of determining benefits eligibility, unless those determinations reflect abuse of discretion. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

[4] PENSIONS k121

Employees who received benefits under their employer's severance plan were also eligible to supplemental retirement benefits under plan adopted by employer's predecessor; although supplemental retirement benefits were limited to "eligible participants who are involuntarily separated under the severance program," and employer claimed severance program excluded the beneficiaries, supplemental retirement program specified its own eligibility criteria. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

[5] PENSIONS k65

Provision of severance program adopted by employer's predecessor barring amendment of program after change of corporate control did not bar modification of supplemental retirement program adopted by predecessor. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

[6] PENSIONS k62

Predecessor employer's supplemental retirement plan was a vested pension plan protected from subsequent modification by ERISA, rather than an unprotected welfare-type severance plan; although eligibility was contingent on involuntary separation from employment, plan's special early retirement benefits and special vested retirement benefits were payable for life and calculated similarly to retirement subsidies in general, and benefits under plan did not duplicate severance benefits also payable. Employee Retirement Income Security Act of 1974, § 204(g), 29 U.S.C.A. § 1054(g).

[7] PENSIONS k121

Employees who were beneficiaries under successor employer's separate severance pay plan were not also entitled to benefits under predecessor employer's severance plan, although predecessor's plan prohibited attempted modifications or cancellations of benefits after change of control had occurred, and successor's severance plan was created after change of control; successor sought to fulfill its severance obligations under predecessor plan by adopting its own plan, and did not intend redundant benefit. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

[8] FRAUD k31
PENSIONS k139
STATES k18.15, 18.51

Employees' pendent state law claims for breach of fiduciary duty, breach of duty of good faith and fair dealing, and negligent and intentional misrepresentation, based on denial of benefits under employer's severance and retirement plans, were preempted by ERISA. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[9] PENSIONS k143

Employees who were beneficiaries under employer's severance and retirement plans were not entitled to award of costs and attorney's fees for expenses incurred in appealing their successful ERISA-based claims, where the beneficiaries had not sought to benefit all participants and beneficiaries of the plan, but only themselves and those similarly situated to them, beneficiaries did not resolve significant legal question regarding ERISA, and defendants did not act in bad faith and legal issues presented were close. Employee Retirement Income Security Act of 1974, § 502(g), 29 U.S.C.A. § 1132(g).

*687Richard F. Knight, Richard A. Richardson, Talley, Anthony, Hughes & Knight, Bogalusa, LA, for all Cavenham defendants-appellants, cross appellees.

Howard Shapiro, McCalla, Thompson, Pyburn & Ridley, New Orleans, LA, for Crown/James River defendants-appellants, cross appellees.

Norman A. Mott, III, Littler, Mendelson, Fastiff & Tichy, New Orleans, LA, for plaintiffs-appellees, cross appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

In this case presenting claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1985), defendants appeal the district court's grant of summary judgment in favor of the plaintiff employees' entitlement to certain severance and pension benefits. The employees cross-appeal, asserting as error the summary judgment against them on their claims to severance benefits as to one of the named defendants and the dismissal of their state law claims as preempted by ERISA, and seeking an award of their costs and attorney's fees incurred in pursuing this appeal. Although we agree with the district court's ultimate disposition of the case, our reasoning is different.

I.

Plaintiffs Jan C. Harms, Robert E. Heinz, Sue C. Magee, Timothy H. Rush, *688 James T. Quitta, and Eddie Welch (the "beneficiaries") are former employees of Crown Zellerbach ("CZ") and Cavenham Forest Industries, Inc. ("CFI"). Attempting to fend off a hostile takeover bid, CZ developed for its employees--who controlled the largest bloc of outstanding CZ stock--an enhanced severance of employment program known as the CZ Change of Control/Restructuring Severance Program, which is an addition to the CZ Salaried Employees Involuntary Separation Salary Continuation Plan ("Continuation Plan") and constitutes part III of that plan. Also at this time, CZ added benefits to its separate Retirement Plan by means of a document entitled "Supplement C." The effective date of both additions was April 1, 1985; the beneficiaries were employed by CZ as of that date. Employees became eligible for these additional benefits only in the event of a "change in control" of CZ.

In July 1985, the anticipated change of control took place, and CZ's various operations were split up, sold off, or taken over by other companies. CZ's Timber and Wood Products operation was acquired by CFI, which extended employment to the beneficiaries on May 5, 1986. By an Employee Benefits Agreement ("EBA") dated March 28, 1986, CZ previously had relinquished, and CFI had assumed, liability for benefits relating to CZ personnel who were shortly to be transferred to CFI. On May 6, 1986, immediately after the sale of the business to CFI and the transfer to it of CZ's former employees, CZ amended its Retirement Plan to eliminate Supplement C.

Within one year's time, each of the beneficiaries was involuntarily separated from CFI and received benefits pursuant to the CFI severance plan. Collectively, the beneficiaries already have received a total of $334,457.75 from CFI in lump-sum payments equivalent to the Paid Terminal Leave owed to them

under the original CZ Involuntary Separation Program. The parties agree that the beneficiaries also are entitled to vested and accrued retirement benefits under the CFI Retirement Plan, to which, according to CZ and CFI, CZ's pension obligations were transferred.

Our dispute centers on the beneficiaries' contention that benefits are also owing to them under the CZ Severance Program and Supplement C and that these claims were wrongly denied. On October 26, 1988, the district court granted CFI's motion for partial summary judgment, concluding that the enhanced severance and Supplement C benefits properly were classified as employee welfare benefits, not pension benefits, and therefore were not subject to ERISA's vesting, accrual, and nonforfeitability provisions. As such, CFI's modification of its employee severance plan to exclude both these benefits did not violate ERISA.

By Memorandum and Order dated December 16, 1991, the district court again granted partial summary judgment, this time in favor of the beneficiaries, holding that they were entitled to both Paid Terminal Leave under the CZ Involuntary Separation Plan and Supplement C benefits under the CZ Retirement Plan. The court's ruling was leavened, however, by its grant of partial summary judgment to CFI, to the effect that the beneficiaries could not collect the full amount of benefits owing under both the CZ and the CFI plans. While CZ legitimately could transfer its severance obligation to CFI, so long as it did not cancel or modify benefits, the court apparently reasoned, the beneficiaries were not entitled to a double-recovery windfall by way of collecting severance payments from both plans for their combined term of service with CZ/CFI.

II.

[1][2] On appeal of a district court's grant of summary judgment, we review *de novo* the court's application of the law to the evidence adduced before it. *Samaad v. City of Dallas*, 940 F.2d 925, 937 (5th Cir.1991). In cases involving the interpretation of an ERISA-covered plan, we likewise construe the terms of the plan *de novo*, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989). The parties agree that the instant plans contain no language according any such authority to the plan fiduciaries.

[3] Accordingly, we must look to the plan language as a guide to our *de novo* interpretation, buttressed only by admissible evidence as to the settlor's intent where the plan terms are ambiguous. *Id.* at 112, 109 S.Ct. at 954 (quoting RESTATEMENT (SECOND) OF TRUSTS § 4 cmt. d (1959)). We must defer, however, to the plan fiduciary's factual determinations made in the course of determining benefits eligibility, unless ***689** those determinations reflect an abuse of discretion. *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1562 (5th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 453, 116 L.Ed.2d 470 (1991).

III.

[4] The first issue we address concerns the district court's 1991 order granting partial summary judgment in favor of the beneficiaries on their Supplement C claim. CFI disputes the order, contending that the beneficiaries are not eligible to receive Supplement C benefits.

To be eligible for Paid Terminal Leave, an employee first had to meet the eligibility requirements set out in section III.A. of the CZ Salary Continuation Plan. *See* Intro. to Summary Plan Description. It is undisputed that sections III.A.5, III.B.4, and IV.D. of that plan apply to the beneficiaries, and CFI argues that the interpretation of these provisions governs the beneficiaries' eligibility for Supplement C benefits as well. The relevant paragraphs of the Plan's section III provide that

> [a]ll active salaried employees of Crown Zellerbach and its U.S. subsidiaries as of April 1, 1985 who are Involuntarily Separated from Crown Zellerbach are eligible for Paid Terminal Leave under the Change of Control/Restructuring Program except:
>
> ....
>
> 5. Employees who, in connection with the sale of an operation, are offered employment with a successor employer which acquires an operation, shall not receive benefits except in the event that such employees are Involuntarily Separated by the successor employer within two years from the Change of Control or within one year from the sale or other disposition of the subsidiary or division, whichever period ends first, in which case the employee will be entitled to the Salary Continuation provided in this Section III.
>
> ....

> B.
>
> ....
>
> 4. A lump sum payment equivalent to Paid Terminal Leave provided above will be paid to an eligible employee who, after a Change of Control, accepts employment with a successor employer in connection with the sale of an operation *and* is Involuntarily Separated by the successor employer within two years of the Change of Control or within one year from the sale of the operation, whichever first occurs.

Salary Continuation Plan at 5, 7.[1]

Pursuant to the above provisions, the beneficiaries received a lump sum payment equivalent to, and in lieu of, Paid Terminal Leave from the CFI Severance Program. CFI contends, however, that the excerpted provisions of the Severance Program unambiguously exclude Supplement C benefits from the range of benefits available to former CZ employees in the position of the beneficiaries. CFI points to the language in Supplement C, stating its purpose "to provide special benefits in lieu of Early Retirement Benefits and Vested Benefits to eligible Participants who are involuntarily separated under the Severance Program."

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[1]Section IV.D. merely defines "involuntary separation." In pertinent part, it states,

> As used herein the term Involuntary Separation means involuntary termination of employment by Crown Zellerbach or its U.S. subsidiaries, and, in the case described in IIIA5 and IIIB4, by successor employers. Employees offered positions with Crown Zellerbach or a new company formed under the Restructuring will not be deemed to have been involuntarily separated for purposes of severance.

Retirement Plan at C-1 (Supplement C). These special benefits set forth in Supplement C, CFI argues, are logically entailed by section III.A.5's reference to "benefits" that employees similarly situated to the beneficiaries "shall not receive"--the sole exception being the lump sum Salary Continuation benefit specified in section III.B.4. Accordingly, CFI urges, the beneficiaries are entitled to the lump sum payment but are precluded from receiving Supplement C benefits.

Our review of the various plan documents refutes CFI's interpretation. Supplement C was adopted as an amendment to the CZ Retirement Plan, *not* the Salary Continuation Plan. In addition to being appended physically to the Retirement Plan, Supplement C's purpose is to provide special benefits in lieu of certain retirement benefits.[2] Although Supplement C benefits ***690** admittedly are limited to "eligible Participants who are involuntarily separated *under the Severance Program*," *see* Retirement Plan at C-1 (emphasis added), it is not the Severance

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[2]Moreover, § 1 of Supplement C states that "Supplement C is a part of the Plan and shall be administered in accordance with the provisions thereof...." Retirement Plan at C-1. The phrase "part of the Plan" we believe refers to the Retirement Plan, to which Supplement C is a formal amendment. *But cf. Wallace v. Cavenham Forest Indus.*, 707 F.Supp. 455, 459 (D.Or.1989) (interpreting identical plans, but construing Supplement C as part of Salary Continuation Plan).

While we acknowledge the parties' stipulation that "Supplement C to the C/Z Retirement Plan was adopted as part of the C/Z severance program," see Uncontested Material Facts at 1 (number 4), we do not believe it compels the conclusion that eligibility for Supplement C should be determined with reference to the Severance Program. Rather, we view the stipulation merely as a reflection of the fact that Supplement C benefits are provided only to employees involuntarily separated from CZ, and that it was adopted contemporaneously with the Severance Program.

Program that sets forth the eligibility requirements for Supplement C benefits; rather, Supplement C specifies its own criteria.[3]

CFI concedes that the beneficiaries meet the literal terms of these criteria. Given our conclusion that Supplement C is a part of the Retirement Plan, and not the Salary Continuation Plan, CFI's argument that the limitation of benefits contained in section III.A.5 of the Salary Continuation Plan/Severance Program includes Supplement C benefits does not survive analysis. The Paid Terminal Leave that the Severance Program accords employees involuntarily separated is neither textually nor logically exclusive of Supplement C's Special Early Retirement

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[3]Supplement C's eligibility terms are as follows:

> SECTION 3. ELIGIBILITY FOR SPECIAL BENEFITS.
>
> (a) *Early Retirement.* A Participant who incurs an Involuntary Separation on or after April 1, 1985, shall be entitled to the Special Early Retirement Benefit under Section 4(a) below in lieu of his or her Early Retirement Benefit if:
>
> > (i) The Participant has a five-year Period of Service and has attained age 55 at the time of his or her Involuntary Separation; or (ii) The Participant has a five-year Period of Service and attains age 55 during his or her Paid Terminal Leave (as defined in the Severance Program).
>
> (b) *Vested Benefit.* A Participant who incurs an Involuntary Separation on or after April 1, 1985, and who is not eligible for the Special Early Retirement Benefit shall be 100% vested in the Special Vested Benefit under Section 4(b) below in lieu of his or her Vested Benefit (if any).

Retirement Plan at C-1, C-2.

Benefit. We find that the plain language of the various plan documents supports the beneficiaries' eligibility to receive Supplement C benefits.

[5] That conclusion, however, does not necessarily compel our finding that the beneficiaries are entitled to receive Supplement C benefits, inasmuch as CFI contends that CZ modified the Severance Program to eliminate Supplement C benefits on May 6, 1986. The district court rejected CFI's reliance upon that amendment because of the wording of section III.D. of the Salary Continuation Plan, which prohibits the cancellation or modification of Severance Program benefits following a change of control.[4]

In light of our conclusion above that Supplement C benefits are not to be deemed a part of the Severance Program for purposes of determining eligibility, we cannot agree with the district court that section III.D. bars the amending of Supplement C benefits after a change of control. Section III.D. does not incorporate Supplement C by reference; indeed, by its own terms its application is limited to "[t]he Change of Control/Restructuring Severance Program described above...." Supplement C, we reiterate, is appended to the Retirement Plan;

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[4]Section III.D. of the CZ Severance Program provides,

> D. *Right to Cancel or Modify Change of Control/Restructuring Severance Program*
> The Change of Control/Restructuring Severance Program described above may be modified or canceled at any time prior to a Change of Control. The benefits will be provided in the event of a Change of Control or restructuring, unless they are modified or canceled prior to a Change of Control.

Salary Continuation Plan at 8.

it is not included in the Salary Continuation Plan of which section III.D. is a part. It would be an odd construction of the plans at issue in this case to deem Supplement C a part of the Severance Program for purposes of applying section III.D.'s non-cancellation provision, but not when applying section III.A.5's limitation of benefits.

[6] Even though section III.D. thus poses no obstacle to CZ's post-change-of-control cancellation of Supplement C, that cancellation ***691** may yet have been barred by operation of section 204(g)(2) of ERISA, 29 U.S.C. § 1054(g)(2), which prohibits the elimination or reduction of retirement benefits that have already vested or accrued.[5] If Supplement C contains the type of early retirement or retirement-type benefits protected by

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[5]Section 204(g) provides in pertinent part as follows:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.
> (2) For purposes of paragraph (1), a plan amendment which has the effect of--
> (A) eliminating or reducing an early retirement benefit or a retirement- type subsidy (as defined in regulations), or
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

29 U.S.C. § 1054(g) (1985). *See generally Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir.1990) (applying § 204(g)), *cert. denied*, --- U.S. ----, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991). CFI does not argue that CZ's May 6, 1986, amendment complied with ERISA § 1082(c)(8), which otherwise would nullify the application of § 204(g).

ERISA, then section 204(g) may prevent its cancellation, at least to the extent that Supplement C's benefits may be deemed to have accrued to the beneficiaries. Because the district court's October 26, 1988, summary judgment order held that Supplement C provided a welfare-type, and not a retirement-type, benefit, and therefore could not be protected by section 204(g), we must review the correctness of this determination before finally deciding whether the beneficiaries are entitled to receive Supplement C benefits.

IV.

In addition to its status as an amendment to the CZ Retirement Plan, Supplement C bills itself as a benefit "in lieu of Early Retirement Benefits and Vested Benefits." Retirement Plan at C-1. Moreover, its benefits are offered to discharged employees in lieu of their normal retirement benefits and are payable for life. In a case involving the application of the identical plans to a similar set of circumstances, an Oregon district court noted that "[t]he benefits provided to employees by Supplement C are essentially the same retirement benefits offered in the original Crown retirement plan, but are to be paid without applying a discount factor for early retirement." *Wallace*, 707 F.Supp. at 460.

Nonetheless, the district court in the instant case determined that Supplement C benefits were best viewed as contingent, unaccrued welfare benefits unprotected by section 204(g).[6]

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[6]Pursuant to 29 U.S.C. § 1051(1), ERISA's vesting, accrual, and non-forfeitability provisions (contained in part 2 of ERISA) do not apply to an employee welfare benefit plan. An employer thus may modify or cancel such benefits without falling afoul of ERISA. *See Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th

Although acknowledging the retirement-like aspects of the Supplement C benefits, the court ultimately found as dispositive the fact that eligibility is contingent upon an employee's involuntary separation from CZ.[7] Admitting the absence of case law directly on point, the court relied upon two cases in which arguably retirement-type benefits were deemed welfare-type severance benefits because conditioned upon the occurrence of a plant shutdown. *See Ross v. Pension Plan for Hourly Employees of SKF Indus.*, 847 F.2d 329, 332-34 (6th Cir.1988); *Flinchbaugh v. Chicago Pneumatic Tool Co.*, 531 F.Supp. 110, 114 (W.D.Pa.1982). Analogizing plant shutdowns to the hostile takeover and spin- off of operations at issue here, the court concluded that the caselaw supported its emphasis on the severance-based condition attached to the Supplement C benefits.

The cases relied upon by the district court are, we believe, distinguishable from the instant case. *Flinchbaugh*, for example, involved the interpretation of a plan that expressly granted broad discretion to the pension trustees to determine eligibility. Where an ERISA plan so provides, *Firestone* permits a reviewing court to sustain the plan administrator's or fiduciary's determination so long as it was not arbitrary or capricious. It is precisely that standard that the *Flinchbaugh* court applied in upholding the plan trustees' characterization ***692** of the plant shut-down benefits at issue there as a severance allowance. *See*

Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984).

[7]Under 29 U.S.C. § 1002(2)(B)(i), severance pay arrangements are deemed to be employee welfare plans for purposes of ERISA. *See also* 29 C.F.R. § 2510.3-1(a)(3).

Flinchbaugh, 531 F.Supp. at 113 ("If the actions of the trustees in determining pension eligibility are not arbitrary or capricious then we must confirm those actions.").

Ross presents a rather more persuasive case, inasmuch as the plan vested no discretion in the administrator, and the eligibility requirements for the benefits at issue closely resembled those set out in Supplement C. *See Ross*, 847 F.2d at 333 (describing plant shut-down benefit payable to participant with fifteen years' service and whose service ceases because of permanent plant shutdown, provided that he is at least fifty-five years old or his combined age and service equal or exceed eighty). *Ross* rejected the contention that such a benefit constitutes a retirement-type subsidy within the meaning of section 204(g).

The conclusion in *Ross* was predicated, however, upon the express statement in the legislative history of the 1984 amendment to section 204(g)(2) to the effect that "a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy." 847 F.2d at 334. The history additionally exempts qualified disability, medical, and death benefits, and social security supplements from the definition of "retirement-type subsidy," while stating as the general rule that "[t]he Committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy." *Id.* at 333.

Significantly enough for the application of this general rule, Supplement C benefits--both the Special Early Retirement Benefit set out in section 4(a) and the Special Vested Benefit provided in section 4(b), see Retirement Plan at C- 2--are payable for life. Moreover, these benefits are calculated similarly to retirement subsidies in general--by multiplying the participant's final average pay figure (the "Dollar Amount") by his years of

service--and the age and service eligibility requirements (age fifty-five and minimum five year service) are substantially the same. *Compare* Retirement Plan at 7 *with id.* at C-1.

Lastly, when one is calculating the Supplement C benefits, "a Participant's Period of Benefit Service shall not include any period during which the Participant receives Paid Terminal Leave." Retirement Plan at C-2, §§ 4(a), 4(b). This exclusion, from the calculation of Supplement C benefits of the period during which Paid Terminal Leave is provided pursuant to the Severance Program, confirms our conclusion that Supplement C does not duplicate severance obligations but is, in fact, a retirement-type subsidy protected by ERISA section 204(g). We are bolstered in this result by the identical conclusion reached in the only published opinion previously reviewing these plans. *See Wallace*, 707 F.Supp. at 460.

As noted above, section 204(g) prohibits the elimination or reduction of the Supplement C benefits by plan amendment "with respect to a participant who satisfies (*either before or after the amendment*) the preamendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2) (emphasis added). It is undisputed that the beneficiaries met the age and service requirements imposed by Supplement C at the time of their termination. The sole remaining eligibility requirement is that the beneficiaries incur an involuntary separation within the meaning of sections III.A.5 and III.B.4 of the Salary Continuation Plan.[8]

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[8]Section IV.D. of the Salary Continuation Plan defines "Involuntary Separation" for the purpose of applying the Plan and Supplement C. See Retirement Plan at C-1 ("Capitalized terms used in this Supplement C and not defined herein shall have the same meanings as in the [Retirement] Plan or the Severance Program."). In the case of employees in the position of the Beneficiaries, § IV.D.

The beneficiaries eventually did fulfill this final requirement but, as CFI points out, not before CZ's May 6, 1986, amendment of its Plan to eliminate Supplement C benefits. Nevertheless, the beneficiaries have met all the preamendment conditions for Supplement C benefits; the fact that they have satisfied them only *after* the amendment is, as we read section 204(g), irrelevant. These were, in short, vested pension benefits that had accrued and could not be reduced or eliminated by subsequent plan amendment. Although we reach our conclusion based upon an analysis different from that employed by the district court, we agree with it that summary judgment in favor of the beneficiaries on this issue was proper.

***693** V.

[7] We next consider whether the district court was correct in its December 16, 1991, summary judgment ruling that the beneficiaries were not entitled to severance benefits from Crown Zellerbach. It is undisputed that the beneficiaries were involuntarily separated by CFI within the period required under sections III.A.5. and III.B.4, that the Severance Program was intended to, and did, apply to employees in the beneficiaries' position, and that neither CZ nor the CZ Salary Continuation Plan has paid beneficiaries any severance benefits. The beneficiaries contend that they are entitled to Paid Terminal Leave from CZ in addition to that which they have received under CFI's separate severance plan and that the district court erred in holding otherwise.

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provides that the strictures of §§III.A.5 and III.B.4 (separation must be within two years of Change of Control or one year of sale of subsidiary, whichever date is earliest) determine eligibility.

CFI counters that it expressly assumed CZ's obligation in the 1986 Employee Benefits Agreement. Under the EBA, CFI assumes the liability for severance benefits payable to "CFI employees," which term includes beneficiaries. CFI states that it incorporated the CZ Paid Terminal Leave benefits into its severance plan and that, by paying beneficiaries pursuant to that plan, it satisfied CZ's obligation.[9]

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[9]The EBA sets out the terms of CFI's assumption of CZ's pension obligations as follows:

> 2. *CFI Employees*. CFI agrees that, as of the Effective Date [of the subsidiary's sale], CFI will be responsible for wages, salaries and other employee benefits in accordance with the provisions of this Agreement for the following employees ...
>
> > (c) any employee of Crown or an affiliated company who is not employed by or in connection with the CFI Businesses or the Energy Properties as of the Effective Date but who, with the consent of CFI, becomes an employee of CFI (including employment in connection with the Energy Properties) within 60 days after the Effective Date....

EBA at 2-3. *See also id.* at 5:

> CFI assumes the liability for any employee-related liabilities with respect to CFI Employees and their dependents that are payable on or after the Effective Date, without regard to when the liabilities arose, including, without limitation ... severance benefits....

Section III.D. of the CZ Severance Plan forbids attempted modifications or cancellations of benefits after a change of control has occurred. The beneficiaries rely upon this provision for the proposition that CFI's attempt to substitute its own plan for CZ's was impermissible. Although the EBA and CFI's severance program were created after the change of control, the district court dismissed the beneficiaries' argument on the grounds that CFI had merely sought to fulfill its obligations under the EBA and accordingly to compensate the beneficiaries for the benefits owed them by CZ by means of adopting its own plan, and that no redundant benefit had been intended.

The district court correctly resolved this issue. There is no provision in the CZ Plan prohibiting transfer of its obligation to pay severance benefits to another entity. Nor is any such transfer necessarily a modification of such benefits, so long as the CFI plan does not reduce the benefits already accrued to beneficiaries by virtue of their service to CZ.[10] What the beneficiaries seek, as they forthrightly conceded at oral argument, is merely a double-recovery windfall--a result abhorred by ERISA. *See, e.g., Lakey v. Remington Arms Co.*, 874 F.2d 541, 545 (8th Cir.1989) (citing cases).

VI.

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[10]*See Dougherty v. Chrysler Motor Corp.*, 840 F.2d 2, 4 (6th Cir.1988) (upholding transfer from prior to successor employer where plaintiff employees would have received same benefits under successor plan on day after transfer as they were entitled to under predecessor plan on day before sale of business); *cf.* ERISA § 208, 29 U.S.C. § 1058 (permitting transfer of assets in connection with sale of business provided accrued *retirement* benefits after transfer are same or better than before).

[8] In its March 11, 1988, Minute Entry, the district court dismissed, as preempted by ERISA, the beneficiaries' pendent state law claims of breach of fiduciary duty, breach of duty of good faith and fair dealing, and negligent and intentional misrepresentation of the terms and conditions of employment. ERISA section 514(a) provides that "the provisions of this subchapter ... shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a) (1985). Because the Supreme Court has declined to extend this broad language to its outermost contours, *see Shaw v. Delta Air Lines,* 463 U.S. 85, 97-99, 103 S.Ct. 2890, 2900-01, 77 L.Ed.2d 490 (1983), we must ask "whether the state law affects relations among the principal ERISA entities." *Sommers Drug Stores v. Corrigan Enters.,* 793 F.2d 1456, 1468 (5th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837, 479 U.S. 1089, 107 S.Ct. 1298, 94 L.Ed.2d 154 (1987).

***694** ERISA's preemptive scope thus may be considerable. In *Sommers*, however, we found no preemption of a state law claim for breach of fiduciary duty where the facts that the corporate director was an ERISA plan fiduciary and that the shareholder was the ERISA plan were incidental and fortuitous circumstances entirely unrelated to the facts underlying the cause of action. *See id.* at 1470. The district court rejected the beneficiaries' attempt to come within *Sommers*, asserting that the denial of benefits under CZ's and CFI's severance and retirement plans, and the representations made as to the benefits available under the plans, constituted the essence of the beneficiaries' state law claims. The heart of these claims undeniably relates to the employee benefit plan and to relations among the principal ERISA entities. The district court did not err in holding that the beneficiaries' state law claims are preempted.

VII.

[9] Lastly, the beneficiaries assert that they are entitled to an award of court costs and attorney's fees on their successful ERISA-based claims. Section 502(g) of ERISA provides that a court "in its discretion may allow a reasonable attorney's fee and costs...." 29 U.S.C. § 1132(g)(1). In deciding whether to award attorney's fees to a party under ERISA,

> a court should consider such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address in applying section 502(g).

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir.1980) (footnotes and citations omitted).

Despite the beneficiaries' citation to cases from our sister circuits asserting that a presumption exists under ERISA in favor of awarding costs and attorney's fees, that is not the law of this circuit. In *Bowen*, cited to us in beneficiaries' petition for

rehearing, we distinguished section 502(g) from analogous provisions in Title II of the Civil Rights Act of 1964 and section 718 of the Emergency School Aid Act of 1972, both of which contained similar discretionary fee provisions that the Supreme Court had interpreted and applied as mandatory where plaintiffs act as "private attorneys general." Instead, we concluded that "incentives in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced." 624 F.2d at 1265- 66.

Applying *Bowen's* five factors to the case at hand, we are not persuaded that the beneficiaries have sought to benefit all participants and beneficiaries of the instant plan, but only themselves and those similarly situated to them, nor have the beneficiaries resolved a significant legal question regarding ERISA (factor 4).[11] And while we have few doubts as to the abilities of the named defendants to pay an award (factor 2), we believe the absence of any culpability or bad faith on the defendants' part (factor 1), coupled with the closeness of the legal issues presented--with the concomitant near-equivalence of merit in the parties' positions that implies (factor 5)--supports our conclusion that an award to the beneficiaries of their costs

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[11]Indeed, the beneficiaries' brief seems to concede as much, concluding on this factor that "[t]he ruling below, as well as this Court's statutory rulings, apply to and specifically benefit many other similarly situated beneficiaries. Defendants' Plans may not, in the future, deny benefits based upon the reasons rejected herein." While laudable, these mainly self-interested objectives are not those we believe the *Bowen* court intended to include within this factor, which favors awards for parties acting as "private attorneys general."

and attorney's fees incurred in pursuit of this appeal is unwarranted.[12]

We venture no opinion as to the propriety of an award by the district court, which determination the court expressly reserved, in its final judgment, until the completion ***695** of this appeal. Having presided over this case since its inception, and being necessarily familiar with the parties and their positions, the district court is well-positioned to know of any bad faith in the handling of this case, as to which we express no opinion.

AFFIRMED.

ON PETITION FOR REHEARING
April 7, 1993.

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Petition for Rehearing is DENIED. Because the original panel opinion erroneously applied the Seventh Circuit standard to determine the appropriateness of an award of costs and attorney's fees to the beneficiaries,[1] however, the decision is

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[12]Given the lack of any bad faith or culpability in the defendants' prosecution of this case, we find the deterrent purpose that the third *Bowen* factor purports to serve to be inapplicable to our analysis.

[1]Although we accept the beneficiaries' contention that we must amend our original opinion in this case, we note that although they petition this court for rehearing primarily upon the ground that we applied the Seventh Circuit standard set forth in *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir.1992), instead of the appropriate Fifth Circuit standard,

hereby amended to revise only the discussion of costs and attorney's fees to read as follows:

[Editor's Note: Amendments incorporated for bound volume publication].

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it is the beneficiaries who cited only Seventh Circuit authority in their original brief and who, in their reply brief, failed to point out any deficiencies in CFI's application of the *Roadmaster* standard.

APPENDIX III

Jan C. HARMS, et al., Plaintiffs-Appellees-Cross-Appellants,

v.

CAVENHAM FOREST INDUSTRIES, INC., et al., Defendants-Appellants-Cross-Appellees.

No. 92-3321.

United States Court of Appeals,

Fifth Circuit.

April 7, 1993.

Employees brought action against their former employer under Employee Retirement Income Security Act (ERISA) seeking to establish their entitlement to ceratin severance and pension benefits following their termination. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, Chief Judge, entered summary judgment in favor of employees, and employer appealed. The Court of Appeals, 984 F.2d 686, affirmed. Thereafter, on petition for rehearing, the Court of Appeals, Jerry E. Smith, Circuit Judge, held that employees who were beneficiaries under employer's severance and retirement plans were not entitled to award of costs and attorney's fees for expenses incurred in appealing their successful ERISA-based claims.

Affirmed.

Pensions, k143

Employees who were beneficiaries under employer's severance and retirement plans were not entitled to award of costs and attorney's fees for expenses incurred in appealing their successful ERISA-based claims, where the beneficiaries had not sought to benefit all participants and beneficiaries of the plan, but only themselves and those similarly situated to them, beneficiaries did not resolve significant legal question regarding ERISA, and defendants did not act in bad faith and legal issues presented were close. Employee Retirement Income Security Act of 1974, § 502(g), 29 U.S.C.A. § 1132(g).

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING

(Opinion March 4, 5th Cir., 1993, 984 F.2d 686)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The Petition for Rehearing is DENIED. Because the original panel opinion erroneously applied the Seventh Circuit standard to determine the appropriateness of an award of costs and attorney's fees to the beneficiaries,[1] however, the decision is

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[1]Although we accept the beneficiaries' contention that we must amend our original opinion in this case, we note that although they petition this court for rehearing primarily upon the ground that we

hereby amended to revise only the discussion of costs and attorney's fees to read as follows:

VII.

Lastly, the beneficiaries assert that they are entitled to an award of court costs and attorney's fees on their successful ERISA-based claims. Section 502(g)(1) of ERISA provides that a court "in its discretion may allow a reasonable attorney's fee and costs ...." 29 U.S.C. § 1132(g)(1). In deciding whether to award attorney's fees to a party under ERISA,

> a court should consider such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. No one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are nuclei of concerns

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applied the Seventh Circuit standard set forth in *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1405 (7th Cir. 1992), instead of the appropriate Fifth Circuit standard, it is the beneficiaries who cited only Seventh Circuit authority in their original brief and who, in their reply brief, failed to point out any deficiencies in CFI's application of the *Roadmaster* standard.

> that a court should address in applying section 502(g).

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980) (footnotes and citations omitted).

Despite the beneficiaries' citation to cases from our sister circuits asserting that a presumption exists under ERISA in *favor* of awarding costs and attorney's fees, that is not the law of this circuit. In *Bowen*, cited to us in beneficiaries' petition for rehearing, we distinguished section 502(g) from analogous provisions in Title II of the Civil Rights Act of 1964 and section 718 of the Emergency School Aid Act of 1972, both of which contained similar discretionary fee provisions that the Supreme Court had interpreted and applied as mandatory where plaintiffs act as "private attorneys general." Instead, we concluded that "incentive in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced." 624 F.2d at 1265-66.

Applying *Bowen's* five factors to the case at hand, we are not persuaded that the beneficiaries have sought to benefit all participants and beneficiaries of the instant plan, but only themselves and those similarly situated to them, nor have the beneficiaries resolved a significant legal question regard ERISA (factor 4).[2] And while we have few doubts as to the abilities of

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[2]Indeed, the beneficiaries' brief seems to concede as much, concluding on this factor that "[t]he ruling below, as well as this Court's statutory rulings, apply to and specifically benefit many other similarly situated beneficiaries. Defendants' Plans may not, in the future, deny benefits based upon the reasons rejected herein." While laudable, these mainly self-interested objectives are not those we believe the *Bowen* court intended to include within this factor, which favors awards for parties acting as "private attorneys general."

the names defendants to pay an award (factor 2), we believe the absence of any culpability or bad faith on the defendants' part (factor 1), coupled with the closeness of the legal issues presented -- with the concomitant near-equivalence of merit in the parties' positions that that implies (factor 5) -- supports our conclusion that an award to the beneficiaries of their costs and attorney's fees incurred in pursuit of this appeal is unwarranted.[3]

We venture no opinion as to the propriety of an award by the district court, which determination the court expressly reserved, in its final judgment, until the completion of this appeal. Having presided over this case since its inception, and being necessarily familiar with the parties and their positions, the district court is well-positioned to know of any bad faith in the handling of this case, as to which we express no opinion.

AFFIRMED.

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[3]Given the lack of any bad faith or culpability in the defendants' prosecution of this case, we find the deterrent purpose that the third *Bowen* factor purports to serve to be inapplicable to our analysis.